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CHARLES ELMORE C

No. 606.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1930.

THE UNITED STATES OF AMERICA,
Appellant,

vs.

WILLIAM H. SPRAGUE and WILLIAM J. HOWEY.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

MEMORANDUM FOR RESPONDENTS ON MOTION TO ADVANCE THE CASE FOR HEARING.

THE BALLOU PRESS NEW YORK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

UNITED STATES OF AMERICA,
Appellant,

against

WILLIAM H. SPRAGUE and
WILLIAM J. HOWEY.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

STATEMENT BY COUNSEL FOR APPELLEES ON MOTION TO ADVANCE BY THE UNITED STATES.

The undersigned makes no objection to an order advancing the above entitled cause for hearing, provided it be for a date not earlier than April 15th, 1931, and asks that no earlier date be set for the following reasons:

The case is of the greatest importance, involving, as it does, fundamental questions of constitutional law, much broader than the constitutionality of the Eighteenth Amendment.

Counsel for the respondents are serving voluntarily as members of the Bar, interested in the constitutional questions involved, representing no organization or group, but appearing solely as a matter of public duty and service.

A scholarly opinion has been rendered by the Court below, which materially aids and supplements the argument contained in our brief in that Court.

The Addenda referred to by the District Judge in his opinion have not, as yet, been filed, even in the District Court.

For the fullest presentation of the important issues involved, counsel desire ample opportunity to prepare their brief. Counsel, Mr. Bacon, Judge Cohalan, Mr. Cohen and the undersigned are at work upon the brief. They are busy practitioners, active in the Trial and Appellate Courts, and engaged in the performance of public and private duties. Mr. Cohen, for instance, is at present officially engaged in the preparation of a report to the Legislature of New York and in research work in connection with the rights of the State of New York in the St. Lawrence River, which must be completed in February.

While it is true that the Solicitor General has served a brief, which has received wide publicity in the Press, that brief contains no reference to the record, as required by the Rules, and fails, in our judgment, to state fully the questions involved and, indeed, takes it for granted that this court is foreclosed from considering the points raised by us and favorably passed upon by the court below.

The foremost question involved in this case is: Can additional powers over the people and their rights be granted to the United States by amendment to the Constitution, unless that amendment be adopted by the people in Conventions duly assembled for that purpose in their several States? We purpose to show, by historical references, by decisions of this court and other courts, and by considered argument that this question must be answered in the negative if the ultimate sovereignty of the people, the cardinal principle of our government, is to be maintained.

We purpose to distinguish all the cases affecting the Eighteenth Amendment and to show that in none of them were the questions, now raised by us, and determined by the court below, presented or considered. In fact, the court below has expressly decided, in opposition to the contention of the government, that these questions have never been passed upon by this court.

We further contend that the questions we raise could not arise concerning, and do not affect any other amendment to the Constitution.

We further respectfully state that this court is not foreclosed, by anything it has said or by anything counsel in any other case have said, from giving to the questions of law presented by this cause the full and adequate consideration which their importance demands. To this end, adequate opportunity for the preparation and presentation should be allowed to counsel.

No adequate reason has been advanced by the Solicitor General for undue haste, either in the preparation of briefs, or in argument or decision. No other court has, as yet, followed the ruling of the learned Judge below, even in the District of New Jersey.

It is true that wide publicity has been given to this decision, but the enforcement agencies of the government have not ceased to function. Public notice has been given by its law department that those who continue to violate the National Prohibition Act will be prosecuted, regardless of this decision. Committing magistrates are still holding alleged offenders to bail and Grand Juries still continue to indict. No evidence is forthcoming that in the last few ~~months~~ weeks the people, because of this decision, are having any less regard for the so-called "Prohibition laws" than they have had in the past, or that government officials are hampered by this decision.

The original Constitution was adopted by act of the people in their conventions held in their respective States and no amendment prior to the Eighteenth attempted to grant any powers of government over the people within their respective States to the United States.

This question we shall show was not argued or considered in *Hawke* vs. *Smith*, No. 1, 253 U. S. 221, or in *Dillon* vs. *Gloss*, 256 U. S. 368, nor was it argued, considered or passed upon by this court in the *National Prohibition Cases*, 253 U. S. 250, despite the contentions to the contrary now made by the Government in its brief.

Our interpretation of Article V of the Constitution and of the Tenth Amendment is based upon careful historical

study of the making of the Constitution, of representations made as to its meaning to secure its adoption by the people, of the careful phrasing and rephrasing of the Tenth Amendment, and of the decisions of this court.

The present motion, as we read the rules, is premature for the following reasons:

FIRST: The return day of the citation is January 17, 1931.

SECOND: No complete record on appeal has yet been prepared, filed or served.

THIRD: The time to answer the government's Statement of Jurisdiction has not expired, and the Statement contains a serious error, to which in due course answer will be made, pointing out that error, and there has been no waiver of the right to file the answer to that Statement in less time than that required by the Rules.

FOURTH: The statement in the motion papers of the questions to be considered is incomplete and inaccurate. The Government assumes that the only question to be presented to this court for determination is, whether or not the points raised in the court below have already been determined by this court in previous cases. With that assumption, we take direct issue. The only court which has passed upon that question, after hearing argument, has decided against the Government. And, of course, the case must rest for final determination upon the decision of the court below and not merely upon any part of its opinion.

Among the questions to be presented on this record, not yet considered or passed upon by this Court, are the following:

1. Did not the dominant aim and purpose of the Constitution, declared in the Preamble of the Constitution, and supported by the method of its adoption, its other provisions

and all the surrounding circumstances, require construction of the Fifth Article so as to restrict the power of selection of a method of adoption so as to require, in this instance, adoption by those competent to grant the added power, namely, the people assembled in conventions in their several States?

2. Did not the Tenth Amendment impose this construction on the Fifth Article?

3. If the original instrument did, by the V Article, grant any such powers to legislatures, does not the Tenth Amendment, with its express reference to "powers not delegated *to the United States* by this Constitution" and its reservation of powers "to the people", *qualify*, *supersede* and *revoke* any such grant of powers to legislatures and reserve "*to the people*" their sole original power to grant further powers to the government over themselves and their rights?

4. Did not the proposal of the Eighteenth Amendment by the Congress expressly "*to the States*", therein differing from the form of proposal of every other amendment, preclude the legislatures from acting thereon as representatives of the people to whom it was not proposed?

5. What was the power reserved to the people by the Tenth Amendment, unless the power to amend away their own rights and to confer on the Government added power over themselves and their rights?

If the reasonable time we ask for the preparation and presentation of these questions is accorded, we are willing to waive our objections to the premature character of the motion and to consent to the cause being advanced for hearing to a date not earlier than April 15th next. And at the same time, we ask that a full day be set aside for the consideration of the fundamental questions involved, and for leave for more than two counsel to be heard.

The error we wish to point out in the Statement of Jurisdiction does not go to the Jurisdiction of this Court, but to the fact that this amendment was not proposed by Congress in the usual form to the legislatures, or even generally, but was, in terms, proposed "*to the States*" for their adoption; the only instance of such a proposal; and this important error we think should not be allowed to pass unnoticed or unchallenged, even in the Statement of Jurisdiction.

Respectfully submitted,

FREDERIC M. P. PEARSE,
Attorney for Defendants.

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THE UNITED STATES OF AMERICA,
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Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

BRIEF FOR APPELLEES.

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